PRIVATE LINE COMMUNICATIONS

IBLA 92-350 Decided April 21, 1998

Appeal from a decision of the Area Manager, Phoenix Resource Area, Bureau of Land Management, requiring payment of balance of rental due for nonlinear communications site right-of-way. AZA-21358.

Affirmed.

1. Appraisals--Communication Sites--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Appraisals

   The BLM's fair market value determination of a right-of-way will be affirmed if the appellant does not demonstrate error in the appraisal method or otherwise present convincing evidence that the fair market value determination is erroneous. A BLM determination that it did not include in its pool of comparable leases a lease which is undervalued because it is unaffected by market trends is not overcome by statements of disagreement or unsupported allegations of error. Absent a showing of error, an appellant is normally required to submit another appraisal in order to demonstrate that the charges are excessive.

APPEARANCES: Robert J. Werner, Esq., Phoenix, Arizona, for Appellant; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Private Line Communications (PLC or Appellant) has appealed a March 12, 1992, Decision of the Area Manager, Phoenix Resource Area, Arizona, Bureau of Land Management (BLM), fixing the annual rental for communications site right-of-way (ROW) AZA-21358 at $5,500, and requiring payment of $23,500 as the balance of the rental due for the period January 31, 1986, through January 30, 1991.

Right-of-Way AZA-21358, for a special mobile radio communication facility on the White Tank Mountains, 28 miles from Phoenix, was previously before the Board in Richard Boulais d/b/a Private Line Communications, 107 IBLA 109 (1989). The factual background is recited in that

decision. In the determination giving rise to the original appeal, BLM had fixed the annual fair market rental charges for the ROW at $5,500, based on a December 22, 1986, appraisal report. On appeal, the Board found, as Boulais contended, that the appraisal had failed to consider a significant comparable lease for a mobile radio relay system issued by the City of Phoenix, the South Mountain Park lease (AZ-006). We therefore set aside BLM's determination and remanded the case for a reappraisal and any necessary recalculation of such charges.

In a May 25, 1989, Order denying BLM's petition for reconsideration of 107 IBLA 109, we noted that BLM's motion contained "new information regarding the South Mountain Park Lease * * * which explains the basis for BLM's previous decision to disregard that lease * * *." We further noted, however, that no explanation was provided why this information was not provided to the Board for its original adjudication of the appeal. In our Order, we provided this further guidance to BLM:

> Finally, we wish to clarify one matter to be addressed by BLM on remand. As noted supra, in our February 1989 decision, we instructed BLM to reappraise the subject right-of-way, giving due consideration not only to the South Mountain Park lease but also to "all other comparable leases." Richard Boulais d/b/a Private Line Communications, supra, at 113. It was our intent that BLM reconsider the pool of 22 leases out of which the 9 comparable leases specifically considered by BLM were drawn, especially where, as we noted, the appraisal, "did not indicate the specific basis for selection of the 9 comparable leases." Id. at 112.
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> Thus, on remand, BLM is to reconsider whether these other leases qualify as comparable leases and set forth its analysis. In addition, BLM may consider any other leases which it deems to be comparable, even if they were not originally included in the pool of 22 leases.

By Order of June 29, 1992, the Board granted PLC's request for a stay of the requirement to pay rental pending appeal. In an October 5, 1992, Order, we noted that the stay did not relieve PLC of its obligation to pay an estimated rental of $2,500 per year. In a February 23, 1993, Order, we denied BLM's motion to lift the stay and dismiss the appeal.

The BLM's reappraisal, dated January 20, 1992, again fixed the fair market annual rental of AZA-21358 at $5,500 and contains a discussion of the "Phoenix South Mountain Site," the relevance of which is in contention in the appeal now before us.

Attached to BLM's reappraisal is a March 11, 1992, cover letter from the Arizona Chief State Appraiser to the Phoenix District Manager. It states that the information received from PLC had been reviewed and that the question whether the South Mountain leases administered by the City

of Phoenix are "comparable leases in the accepted appraisal sense" with AZA-21358 and the pool of leases used to evaluate AZA-21358 had been reconsidered. The letter states in part:

> We find that because the method of establishing South Mountain rentals involves little, if any "free market" input, and because the rentals are so at odds with the preponderance of the market information, the information has little bearing on the market value of the subject lease.
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> We note that if the appraisal process allowed selection of any group of leases without scrutiny of the circumstances establishing the rental price, one could look to the many other White Tank Mountains sites as the most physically comparable, and these are all leasing for $5,000-$6,000 per year.

The reappraisal also contains a review statement by the Arizona Chief State Appraiser which offers the following explication of why the South Mountain sites fail as comparables:

> [T]he [Phoenix] city government is not acting as a self-interested party in the market value definition sense. A "City Council Report" dated 9/15/80 and a letter to the appraiser dated 3/24/89 substantiates the longstanding difficulty the City of Phoenix is having regarding the communication site rental. It is noted that the City Council Report states that the rental for the sites had not been addressed for a period of twenty-seven years, a fact that by itself is a convincing statement as to the level of attention the city has devoted to management of the site. Since the report date of over 12 years ago, the rental has only been changed twice. This is further substantiated by the city's current efforts to bring the rate structure into some level of compliance with the rates their advisor (Meiling) has recommended. It is easy to appreciate the political considerations the city is facing, given the long standing use of the sites by major entities at a nominal charge and the order of magnitude of the recommended rental charges. The appraiser has correctly concluded that the motivations of the lessor of the South Mountain sites do not comport with the tenets of market value.
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> The second reason the city's leases are not sound indications of market value is evident when they are compared to other leases in the area. Given the ideal characteristics of South Mountain for communication sites, one would expect a rental commensurate with such physical characteristics. When compared to sites not so ideally suited, the rental disparity is clearly at odds with the preponderance of the market evidence. The market value definition requirement of "most probable price" eliminates grossly aberrant data from direct consideration because it does

> not contribute to a "most probable" finding. In any statistical analysis the data significantly out of the data range is discarded. While appraisals are not, by any means, a purely statistical function, data at extreme conflict with the balance of information is properly given little weight.

(Reappraisal at 2-3.)

In Appendix B 1/ of his reappraisal, BLM's appraiser states that the South Mountain lease "was studied and listed in the [previous] appraisal report, but was not credited with much weight because it failed to meet the criteria for market value." The appraiser asserts that one of the insurmountable problems with including a site like South Mountain, which is controlled by the City of Phoenix Parks Department, "is that there is no way to adjust it to the subject." As an example, he cites a below market rental agreement between friends which would not serve as a market indicator and could not be used as a comparable. The appraiser explains that rents on South Mountain "do not float with market levels because [Phoenix] has no requirement to seek market rent." Further, the Parks Board, the body responsible for collecting rents is staffed by "appointed members who act independently of city employees" and the Board has no responsibility to collect fair market rental. The appraiser cites the September 15, 1980, statement by the Parks Department to the effect that the existing fee structure used by the City of Phoenix was a minimal charge unrelated to any standard assessment. The appraiser further notes that the fact that South Mountain sites allow for public convenience uses makes them less than a valid comparable; the Parks Department is wary of setting higher rentals "for fear claims of profit making may invoke the patents reverter clause." 2/ The appraiser's discussion includes a listing of 10 commercial communicator leases in Arizona ranging from $2,394 (Hulapai Mountains, Kingman, Arizona) to $16,000 (Estrella Mountains, southwest fringe of Phoenix) in annual rental. Another of these leases, in southwest Phoenix on the Estrella Mountains, has a rental of $10,000. The ROW at issue here, on the west side of Phoenix ($5,500) and the South Mountain Park Site ($4,800) are also included in this list. The appraiser observes in closing

> that the "South Mountain Communication site does not approach market levels. It is an issue that presently stands before the city and its licensees. On[c]e this is clear, there is a large

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1/ The Appendix is not paginated.

2/ The file indicates that Phoenix holds the properties being leased as communications sites under a Recreation and Public Purposes Act (R & PP Act), 43 U.S.C. § 869 (1994), patent. The BLM states that title under the R & PP Act is subject to reversion and defeasance to the United States for nonuses and use for purposes other than those specified in the grant. (Motion to Lift Stay and for Dismissal of Action, hereinafter referred to as Response, at 8.)

> distance between the appraisal of a Commercial Communicator site of $20,000 and the current $4,800 per year. There is hope that the matter may be agreed upon this year. Aware of these conditions and facts, a communication site on South Mountain cannot be fairly compared to achieve market indications.

Appellant contends that the appraisal fails to properly consider the South Mountain Park lease because that lease "represents a lower rental for a vastly superior communication site." (Statement of Reasons (SOR) at 4.)

The PLC asserts that South Mountain has a better geographic and demographic coverage than its own site, AZA-21358, which has only one sixth of the radio channels South Mountain has. Moreover, PLC asserts, its customer billing is barely one tenth of South Mountains.

The PLC cites site accessibility and extent of demographic coverage, as indicative of the superiority of the South Mountain site. The PLC suggests that based on this and other factors, South Mountain would have to be valued at an annual rental of "$38,571 * * * in order to justify a $5,500 annual rental for AZA-21358." (SOR at 6.) The PLC asserts that, acting in its own best interest, the City of Phoenix Parks and Recreation Department increased the South Mountain site rental to $5,400, effective July 1, 1992.

Finally, PLC argues that the $5,500 rental for AZA-21358 should be set aside because it is excessive based on comparable leases utilized and because relevant comparables were not utilized.

The PLC asserts that BLM failed to consider AZA-18236, a site on Newman Peak, Arizona, renting at $1,300. The PLC alleges that this site is superior to AZA-21358. The PLC further alleges that BLM erroneously ignored a third comparable, N-38460, near Las Vegas. Next, PLC points to 18 leases (Reappraisal at 15) on which, it contends, the appraiser has supplied "incomplete information." (SOR at 9.) The PLC refers to leases, AZ-009 and AZ-10 both renting for $2,000. The PLC alleges that the appraiser attempts to downplay the comparability of AZ-009 by characterizing it as an isolated site several miles north of Prescott, Arizona. The PLC asserts that this lease is a 1-acre telephone microwave relay between a private landowner and MCI for 24,000 phone lines. Similarly, the appraiser failed to mention that AZ-10 is also a lease between a private landowner and MCI. The PLC asserts that AZA-21358 is much smaller in area than these two sites.

Next, PLC refers to the evaluation of various leases in the reappraisal. The PLC charges that 10 of these leases are not comparable because they involve "participation agreements" and are superior in coverage and are intensively managed by the lessor. As to several of the remaining leases, PLC charges that the appraiser has a tendency to "discuss only the aspects of a lease that are favorable to the BLM's position." Therefore, PLC asserts, it is difficult to assume that these leases are in fact comparable to its own lease. (SOR at 9.)

In its response, BLM defends the exclusion of the South Mountain Park lease from its list of comparables. With regard to PLC's specifications of error as to the comparables actually utilized by BLM, counsel points out that access to the Newman Peak site, AZA-18236, is only by helicopter or by foot, limitations which do not attach to AZA-21358. The BLM asserts that PLC has not shown in what ways Newman Peak and Frenchman Mountain (N-38460) are comparable, much less superior to AZA-21358. (Response at 14.)

Next, BLM responds to PLC's argument that certain sites, furnished BLM by PLC, should have been, but were not used as comparables. These sites are listed on page 15 of the reappraisal. The rationale given in the reappraisal for not utilizing theses sites is as follows:

> Most of the PLC leases referred to on page 15 are outlying microwave sites or U.S. Forest Service sites which are plentiful in showing what the rent should not be. Neither [sic] has much bearing on an urban Commercial Communicator site. Furthermore, those in touch with the communications industry are aware of the complications the Forest Service has with communications site rents. Briefly, the situation began with long standing "book" rates that fixed rents so that over time the difference between actual charges and market levels grew to a very sizeable one. When appraisals were ordered the sub-market level was made even more clear. With large increases needed to reach market rent, many permittees, of course, appealed. Until that matter is settled, introducing either of the older or the newly proposed rates means making a choice, for they are anything but agreed upon.

(Reappraisal at 16.)

With the exception of the South Mountain site, AZ-006, described as a "commercial communicator on South Mountain Phoenix," the sites supplied by PLC range from a high rental of $2,600 down to a low of $100. The sites cited by PLC, AZ-009 and AZ-10 (both renting for $2,000), are microwave sites north of Prescott and near Peach Springs, Arizona, respectively. The BLM asserts that these sites are not comparable because they are for a different purpose (microwave as opposed to commercial communicator, with differing space and proximity needs), and have different market access (rural Arizona as opposed to the Phoenix area). (Response at 15.)

Table 5 of the reappraisal at page 17 lists a "Final Lease Array" of 19 leases in 5 states, including Arizona, together with their time adjusted rental and their adjacent populations, ranging from 30,000 to 4,000,000. The appraiser explains that leases 1 through 5 ranging in rental between $13,440 and $16,432, "are participation agreements where the rents reflect a connection to business success." (Reappraisal at 18.) These sites are "superior in coverage" and "intensively managed by the lessor." The appraiser then contrasts and compares each remaining lease, or groups of leases with AZA-21358 discussing such factors as population coverage and accessibility. The appraiser concludes:

> If we take only the Arizona leases with adjoining populations 50,000 and above, the range established is one of $16,000 to $4,544 per year. Because Leases 2, 7, 8, 9, 10, and 13 involve participation lease agreements in which rental varies with the number of frequencies used, they are given a bit less weight. The reasoning here is that these rents cannot necessarily apply to a wide variety of users such as we have on White Tanks and would not be reflective of fair rent to a new operator with few customers. Importantly though, in addition to the rents, these leases also provide a floor or base rate of $6,000 per year. That establishes a better idea of the total rental rate suggested by these six sites covering rental possibilities from $6,000 to $16,000/yr.
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> That leaves the balance of Arizona leases on a flat rate running from $11,953 of Lease 6 [Tucson] to $4,544 of Lease 17 [Yuma]. As already stated, Lease 6 in Tucson is much like South Mountain in that it abuts city development and has paved access. Therefore it strongly indicates a value sharply below $11,000 for the subject. Mt. Elden above Flagstaff has an adjusted rental of $4,764 and since it serves a much smaller population base, the rental indication here is one above $5,000. Now we come to the sites on White Tanks that currently have rentals of $5,500 and $6,000 per year. These of course, need only slight time downward adjustments to the most recent $6,000 rents. From this information there is a strong indication for the subject from $5,000 to $6,000 per year.

(Reappraisal at 19-20.)

[1] As a rule, BLM's fair market value determination will be affirmed if the appellant does not demonstrate error in the appraisal method or otherwise present convincing evidence that the fair market value determination is erroneous. Regina Perry, 142 IBLA 278, 281 (1998), and cases there cited. In this case, the Board instructed BLM to reappraise AZA-21358 "giving consideration not only to the South Mountain Park lease but `all other comparable leases'." (May 25, 1989, Order.) We have thoroughly reviewed BLM's reappraisal in light of Appellant's challenges and we conclude that the analysis given for excluding the South Mountain Park lease from the pool of comparable leases is valid and supportive of BLM's fair market value determination. See Communications Enterprises, Inc., 105 IBLA 132 (1988); High Country Communications, Inc., 105 IBLA 14 (1988); Clinton Impson, 83 IBLA 72 (1984); Full Circle, Inc., 35 IBLA 325, 85 I.D. 207 (1978).

We turn first to the question of the relevancy, to the appraisal process, of the South Mountain Park lease. We have quoted above substantial portions of BLM's rationale for excluding the South Mountain Park lease from its appraisal of Appellant's ROW. These excerpts amply demonstrate

that the South Mountain site does not comport with the accepted definition of fair market value, which is the "amount in cash, or on terms reasonably equivalent to cash, for which in all probability the property would be sold by a knowledgeable owner willing but not obligated to sell to a knowledgeable purchaser who desired but is not obligated to buy." (Uniform Appraisal Standards for Federal Land Acquisitions (Uniform Appraisal Standards) (1992), at 4.) See Perry, supra, at 281.

The PLC focuses on site amenities and makes various comparisons between the South Mountain Park Site and AZA-21358. However, the attributes of the site are not in dispute. What PLC entirely ignores is the significance of the crucial distinctions between the leasing circumstances of the South Mountain Park lease and the comparables used in the reappraisal. These circumstances clearly indicate lack of market forces in establishing rental value and therefore properly serve to remove the South Mountain site as a reasonable comparable for the purposes of fixing fair market rental value for PLC's site. While PLC characterizes BLM's rationale as "unsubstantiated" and "unconvincing" (SOR at 3), it does not dispute the factual background sketched in BLM's reappraisal. This background is neither unsubstantiated nor unconvincing. It constitutes a credible supporting justification for BLM's refusal to utilize the South Mountain Park lease as a comparable. In Randy L. Power d/b/a Procomm, 114 IBLA 205, 208 (1990), where BLM's proposed rental for a White Tanks communications site was appealed, the Board found that rental for the South Mountain sites leased by the City of Phoenix was "below market." Here, as in Procomm, Appellant has not shown that the South Mountain rental was for fair market value. We conclude that the South Mountain lease was properly excluded from BLM's reappraisal.

Secondly, we find that BLM appropriately restructured its pool of leases from which its comparables were drawn with specific attention to elements such as similarity of use. The reappraisal contains an explanation why certain types of leases were selected and others omitted. The PLC's arguments that the appraiser supplied incomplete information on certain leases, or attempted to downplay their importance, are not sustained by a fair reading of the appraiser's rationale for selection of comparables.

The PLC's disagreements with the appraisal are understandable. However, PLC has not shown how BLM's selection of comparables, and its derivation of fair market rental for AZA-21358 is in error. Where there is no showing of error in BLM's appraisal method, it normally must be rebutted by another appraisal. Great Co., 112 IBLA 239, 242 (1989), and cases there cited. The PLC has not submitted an alternative appraisal, or offered cohesive data to suggest that the alternative sites PLC favors should be utilized instead to reach a result other than that reached by BLM. It is incumbent upon Appellant not merely to allege error, but to demonstrate error through submission of proof by a preponderance of the evidence. Procomm, supra, at 207.

To the extent not discussed herein, PLC's other arguments have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed and the stay of the requirement to pay rental pending a decision on appeal, granted by the Board's Order of June 29, 1992, is lifted.

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James P. Terry
Administrative Judge

I concur:

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Bruce R. Harris
Deputy Chief Administrative Judge